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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

JOHN E. WARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF STANDARD INSURANCE COMPANY IN SUPPORT OF THE PETITION

MICHAEL A. CONLEY
Counsel of Record
PILLSBURY MADISON & SUTRO LLP
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 861-3000
Attorney for Amicus Curiae Standard Insurance Company

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MOTION OF STANDARD INSURANCE COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, Standard Insurance Company ("Standard") hereby moves for leave to file the attached brief *amicus curiae* in support of the petition filed by Unum Life Insurance Company of America ("Unum"). Petitioner has consented to the filing of this brief. Respondent has not consented to the filing of this brief.

Standard has a direct and substantial interest in the issues presented in the petition. Standard is one of the nation's largest providers of group long-term disability and retirement insurance, with over 60,000 group clients representing more than 4 million individual participants in many different States. The Ninth Circuit's decision

means—at a bare minimum—that claim filing deadlines in long-term disability plans insured by Standard are valid in some States but not in others, seriously undermining the uniformity and predictability in claims handling that ERISA was enacted to ensure.

Moreover, as described in greater detail in the attached brief, the impact of the Ninth Circuit's decision in this case is far broader than the specific "notice-prejudice" and "*Elfstrom*" rules at issue here. *Ward* holds, first, that a state law that indisputably affects the administration of an ERISA plan is saved from preemption as a law that "regulates insurance" even though it has nothing to do with "spreading the policyholder's risk"—which this Court has identified as an "indispensable" characteristic of insurance. *Ward* also holds that the state-law *Elfstrom* rule is not preempted because it does not "relate to" the ERISA plan at issue in this case—even though that rule abrogates express provisions of the plan and creates an agency relationship between the ERISA insurer and the plan administrator. These holdings substantially narrow the breadth of ERISA's preemption clause, subject ERISA administrators like Standard to widely varying sets of regulations from State to State, and necessarily increase the cost of supplying benefits.

For the foregoing reasons, Standard respectfully requests that this Court grant it leave to file the attached brief *amicus curiae*.

Respectfully submitted,

MICHAEL A. CONLEY
Counsel of Record
PILLSBURY MADISON & SUTRO LLP
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 861-3000
Attorney for Amicus Curiae Standard Insurance Company

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BRIEF AMICUS CURIAE OF STANDARD INSURANCE COMPANY IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

Standard's interest in the issues presented by the petition is substantial and direct for the reasons set forth in the foregoing motion for leave to file this brief.* In sum,

* Pursuant to Rule 37.6, *amicus* Standard Insurance Company states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioner has consented to the filing of this brief and their letter of consent has been filed with the Clerk of the Court. Respondent has not consented.

Standard is one of the largest providers of insurance to plans covered by ERISA and thus is necessarily affected by the lack of uniformity in ERISA preemption law and the conflicting obligations that this creates. Because the Ninth Circuit's decision in this case conflicts with the Fifth and Eleventh Circuits' decisions in *CIGNA Healthplan v. Louisiana*, 82 F.3d 642 (5th Cir. 1996), and *Anschultz v. Connecticut General Life Ins. Co.*, 850 F.2d 1467 (11th Cir. 1988), the ability of benefit plans to establish time limits for submitting claims is different in California than it is in Texas and Florida. Further, the rationale underlying the Ninth Circuit's ruling on the bounds of ERISA preemption makes it at best uncertain whether other benefit plan provisions are enforceable. Because this decision substantially undermines the predictability that ERISA was enacted to provide, Standard has a compelling interest in this Court granting the petition.

REASONS FOR GRANTING THE PETITION

The petition offers a textbook case for this Court's intervention. The Courts of Appeals are clearly divided on the important ERISA issues presented and there is no reason to suppose that the split will resolve itself. In this case, the Ninth Circuit held that a state law that relates to an employee benefit plan can be "saved" from ERISA preemption on the ground that it "regulates insurance" even though it *does not* satisfy all three of the McCarran-Ferguson Act factors for assessing whether a law regulates "the business of insurance." *Cisneros v. Unum Life Ins. Co.*, 134 F.3d 939, 944-47 (9th Cir. 1998). The Sixth Circuit agrees. *See Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 940-41 (6th Cir. 1997). The Fifth Circuit, however, has held that a state law that relates to an employee benefit plan cannot be "saved" from ERISA preemption on the ground that it "regulates insurance" unless that law satisfies *all three* of the McCarran-Ferguson Act factors. *See CIGNA Healthplan*, 82 F.3d at 650. The

Eleventh Circuit agrees. *See Anschultz*, 850 F.2d at 1469.

The Ninth Circuit also held that a state-law rule imputing an agency relationship between the plan administrator of the ERISA plan at issue in *Ward* and the plan's insurer (the so-called "*Elfstrom*" rule) was not preempted by ERISA because that state-law rule did not "relate to" the ERISA plan. This holding conflicts with *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1492-95 (7th Cir. 1996), in which the Seventh Circuit held that a comparable state-law "ostensible agency" rule "related to" the ERISA plan at issue in that case and was preempted.

There is no benefit to allowing these issues to "percolate" any longer in the lower courts: the split in authority is established and unlikely to resolve itself absent intervention by this Court. This is particularly true because the current split in authority on the insurance savings clause issue has been fostered by this Court's unelaborated statement in *Union Labor Life Ins. Co. v. Pireno* that "[n]one of [the McCarran-Ferguson] criteria is necessarily determinative in itself . . . ." 458 U.S. 119, 129 (1982).

In addition to satisfying this traditional criterion for certworthiness, this case offers the Court a good vehicle for resolving the ERISA issues presented in the petition: the issues were clearly raised and adjudicated at the trial and appellate levels, both sides of the issues will be ably briefed, and there are no procedural impediments to reaching and deciding the issues presented.

In short, this split in authority is one which the Court needs to resolve, and it should do so in this case.

I. THE CIRCUIT SPLIT REGARDING THE SCOPE OF ERISA'S "INSURANCE SAVINGS CLAUSE" IS CLEAR AND WILL NOT RESOLVE ITSELF.

In ruling that the California notice-prejudice rule is not preempted by ERISA, the *Ward* court relied directly on the Ninth Circuit's recent decision in *Cisneros v. Unum Life Insurance Co.*,[1] in which the panel candidly acknowledged the split in authority that the petition is asking this Court to resolve:

> We recognize that the Fifth Circuit has held that all three of the McCarran-Ferguson factors must be satisfied for a law to "regulate insurance." *CIGNA Healthplan of La., Inc. v. State of La.*, 82 F.3d 642, 650 (5th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 387, 136 L.Ed.2d 304; *Tingle* [*v. Pacific Mut. Ins. Co.*,] 996 F.2d [105] at 108 [(5th Cir. 1993)]. We respectfully disagree. From our interpretation of *Metropolitan Life* [*Ins. Co. v. Massachusetts*, 471 U.S. 722 (1985)] and *Pilot Life* [*Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)], we conclude that the McCarran-Ferguson factors are simply relevant considerations or guideposts, not separate essential elements of a three-part test that must each be satisfied for a law to escape preemption.

Cisneros, 134 F.3d at 946.

The Ninth Circuit accurately reads *CIGNA Healthplan* and *Tingle*. In both cases, the Fifth Circuit stated clearly that to fall within the "insurance savings clause" and thereby avoid ERISA preemption, a statute must satisfy all three McCarran-Ferguson criteria for regulating insurance:

[1] Petitioner Unum Life Insurance Company of America has also filed a petition for certiorari in *Cisneros*. *Cisneros* presents the same "insurance savings clause" issue as *Ward*, but does not present the additional critical issue in *Ward* regarding the types of state laws that "relate to" an ERISA plan and are therefore preempted. Standard therefore urges the Court to grant the petition for certiorari in *Ward*.

> If the statute fitted the common sense definition of insurance regulation and the court answered "yes" to each of the questions in the three part test, then the statute fell within the savings clause exempting it from ERISA preemption.
>
> * * * *
>
> Although the statute fits the common sense definition of insurance regulation, it fails to satisfy at least one prong of the three part *Metropolitan Life* test. Thus, the statute does not fall within the ERISA insurance savings clause and is, therefore, preempted by ERISA.

Tingle, 996 F.2d at 109; *see also CIGNA Healthplan*, 82 F.3d at 650 ("[I]f a statute fails to satisfy any one element of the three-factor *Metropolitan Life* test, then the statute is not exempt from preemption by the ERISA insurance savings clause").

The Sixth Circuit has recently sided with the Ninth Circuit, citing *Pireno* and the decision underlying this petition and holding that "[t]hese [McCarran-Ferguson] criteria must be considered in combination, and, standing alone, no single one is dispositive." *Davies*, 128 F.3d at 940. The Eleventh Circuit agrees with the Fifth Circuit, holding that a statute that "fails to satisfy all of the criteria of the McCarran-Ferguson Act . . . falls outside of the ERISA saving clause . . . [and] is preempted." *Anschultz*, 850 F.2d at 1469.

In light of this established split in authority, there is no good reason for the Court to await further consideration of this issue by the lower courts.

II. THE CONFUSION REGARDING THE SCOPE OF ERISA'S INSURANCE SAVINGS CLAUSE STEMS FROM AMBIGUOUS LANGUAGE IN *PIRENO*.

In *Cisneros*, the Ninth Circuit properly recognized that the California notice-prejudice rule at issue in this case does not have "the effect of transferring or spreading a

policyholder's risk," the first of the McCarran-Ferguson criteria for assessing whether a statute "regulates insurance":

> In this regard, the notice-prejudice rule is different from the Massachusetts mandatory benefits law at issue in *Metropolitan Life*. That law altered the substantive scope of coverage that Massachusetts insurance companies contractually were obligated to provide. Thus, unlike the statute in *Metropolitan Life*, the notice-prejudice rule does not spread the policyholder's risk within the meaning of the first McCarran-Ferguson factor.

Cisneros, 134 F.2d at 946.

Nevertheless, the *Cisneros* court ruled that the notice-prejudice rule fell within ERISA's "insurance savings clause" by reading this Court's ERISA decisions to hold that "the McCarran-Ferguson factors are simply relevant considerations or guideposts, not separate essential elements of a three-part test that must each be satisfied for a law to escape preemption." 134 F.2d at 946. In support of this determination—the heart of the Circuit split the petition is asking this Court to resolve—the *Cisneros* court stated:

> Indeed, in cases interpreting the McCarran-Ferguson Act—from which the factors were born—the Supreme Court has explicitly noted that "none of [the factors McCarran-Ferguson factors] is necessarily determinative."

134 F.3d at 946 (citing *Pireno*, 458 U.S. at 129).

The Ninth Circuit broadly read this somewhat ambiguous statement in *Pireno* to make each of the McCarran-Ferguson criteria—including the risk spreading feature that the *Cisneros* court acknowledged was absent in the notice-prejudice rule at issue—*dispensable* in the insurance savings clause analysis. This reasoning runs contrary to this Court's unambiguous statements in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979),

that: (1) "The *primary* elements of an insurance contract are the spreading and underwriting of a policyholder's risk" (*Id.* at 211) (emphasis supplied); (2) "The significance of underwriting or spreading of risk as an *indispensable* characteristic of insurance was recognized by this Court in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65" (*Id.* at 212) (emphasis supplied); and (3) "The petitioners do not really dispute that the underwriting or spreading of risk is a *critical determinant* in identifying insurance." *Id.* at 213.

Although the Ninth Circuit's rulings in *Ward* and *Cisneros* are inconsistent with this Court's holding in *Royal Drug Co.*, the critical point is that the root of the confusion that produced the decisions in *Ward* and *Cisneros* (and the Circuit conflict on the important ERISA preemption issue presented in the petition) is ambiguous language in *Pireno* which *only* this Court can clarify.

III. THE COURT ALSO SHOULD RESOLVE THE LINGERING CONFUSION REGARDING THE TYPES OF STATE LAWS THAT "RELATE TO" AN ERISA PLAN AND ARE THEREFORE PREEMPTED.

The Ninth Circuit's decision in *Ward* also provides this Court with an opportunity to address another critical ERISA preemption issue that has divided the Circuits—the types of state laws that "relate to" an ERISA plan and therefore are preempted by ERISA. In *Ward*, the Ninth Circuit held that a state-law rule (the *Elfstrom* rule)[2] creating an agency relationship between the ERISA plan insurer (Unum) and the plan administrator (respondent's employer Management Analysis Company ("MAC") did not "relate to" the plan because the rule had only a "tenuous" connection to the plan:

> While § 514(a)'s language is "deliberately expansive," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), ERISA does not preempt "if the state

[2] The rule derives from *Elfstrom v. New York Life Ins. Co.*, 67 Cal.2d 503 (1967).

law has only a 'tenuous, remote, or peripheral' connection with covered plans, . . . as is the case with many laws of general applicability . . . ." *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)). . . . The Supreme Court recently acknowledged the existence of "myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *California Div. of Labor Satndards Enforcement v. Dillingham Constr.*, 117 S.Ct. 832, 842 (1997).

* * * *

ERISA and *Elfstrom* are not anathema. *Elfstrom* does not dictate the benefits to be provided or the manner in which the plan will be administered. *Elfstrom* does not require an employer to participate in the administration of a group insurance policy or an insurer to delegate its functions to an employer. . . . *Elfstrom* simply describes in legal terms a relationship that already exists in fact.

Ward, 135 F.2d at 1287 (parallel cites omitted).

The Ninth Circuit recognized that the plan documents at issue in *Ward* provided specifically that "[u]nder no circumstances will the policyholder [MAC] be deemed the agent of the Company [UNUM] without a written authorization." *Id.* at 1284. But, the *Ward* court concluded that even though it was holding that *Elfstrom* overruled this plan provision, *Elfstrom* did not relate to the plan because "[p]lan documents defining or disavowing a relationship do not have the status of the ERISA statute . . . ." *Id.* at 1288.

In direct contrast, the Seventh Circuit applied the same precedent and ruled in *Jass* that a state-law rule creating an agency relationship between an ERISA plan and a treating physician under the plan "related to" the plan and was preempted:

> In this case, both of Jass' vicarious liability claims against PruCare for Dr. Anderson's alleged negligence (Counts I and II) directly "relate to" the Plan. . . . If an agency relationship existed between PruCare and Dr. Anderson, as Jass alleged, it was solely as a result of the PruCare's health plan of which Jass was a participant. . . . Additionally, to determine whether an actual or apparent relationship existed between Dr. Anderson and PruCare would require an examination of the health care benefit plan to determine the relationship between Dr. Anderson, PruCare and Jass. In fact, the health benefit plan contains a section entitled "relation among the parties affected by the group contract," which states that no participating physician is an employee or agent of PruCare. We note this not to resolve the question of agency, but to highlight that Jass' claims "relate to" the health benefit plan.

Jass, 88 F.3d at 143.

The decisions in *Ward* and *Jass* are irreconcilable: the very factors that the Seventh Circuit found determinative of the preemption inquiry were deemed inconsequential by the Ninth Circuit. Although Standard believes that the *Ward* court misapprehended this Court's ERISA precedent and, in particular, read *Dillingham* much too broadly, the critical point is that in spite of this Court's efforts to clarify the meaning of "relates to" in Section 514(a) of ERISA, the Circuits remain confused. *Dillingham* did not purport to change the law. Yet, the Ninth Circuit has read that case as somehow narrowing the Court's long-standing view that Section 514(a)'s preemption clause is "deliberately expansive" (*Pilot Life*, 481 U.S. at 46) and "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). As with the "insurance savings clause" issue, this confusion is something that only this Court can resolve.

IV. THE ISSUES PRESENTED ARE OF WIDESPREAD SIGNIFICANCE.

The bottom line is that the Circuits have adopted irreconcilable positions on the types of state laws affecting employee benefit plans that survive ERISA preemption.

The unavoidable result of these inconsistent rulings is the precise "patchwork scheme of regulation" which ERISA's broad preemption provision was enacted to eliminate and thereby increase efficiency and reduce the cost of providing benefits. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987). The Court has recognized that subjecting benefit providers to disparate legal regimes increases the risk that employers will opt not to offer certain benefits to their employees. *See id.* Varying court rulings on the status of statutes like the California notice-prejudice rule at issue here will compel benefit providers to

> design their programs in an environment of differing State regulations[, which] would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits.

FMC Corp., 498 U.S. at 60.

This is the risk Congress intended to avoid in enacting ERISA. By granting the petition and reversing the Ninth Circuit's decision, this Court will ensure the uniformity of law essential to effective cost containment and the correlative increase in the availability of benefits to plan beneficiaries.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

MICHAEL A. CONLEY
Counsel of Record
PILLSBURY MADISON & SUTRO LLP
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 861-3000
Attorney for Amicus Curiae Standard Insurance Company

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